IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 04.08.2006

CORAM

THE HON'BLE MR.JUSTICE A.C.ARUMUGAPERUMAL ADITYAN

C.M.P.NO.9059 OF 2006
and
C.R.P.(NPD).1795 of 2005

ORDER

Both the learned counsel for the petitioner as well as the learned counsel for the respondent are present at 1.45 p.m today(4.8.2006).

2. The learned counsel for the petitioner/respondent in CRP would contend that the order passed in C.R.P.(NPD).No.1795/2005 is an exparty order and hence, he wants, the order passed in C.R.P.(NPD.No.1795/2005 to be set aside. In support of his contention he relied on AIR 1983 SUPREME COURT 318 (Savithri Amma Seethamma Vs. Aratha Karthy and other). The facts of the said case are that:
"on 30.3.1982, when CRP.No.776 of 1981 preferred by the first respondent came to be heard by the learned single Judge of the High Court, the advocate engaged on behalf of the appellant could not appear because he was engaged in another Court and it was only later after the Court had closed for summer vacation on 7th April, 1982, that he came to know that the revision application had already been heard and decided in favour of the first respondent. The learned advocate for the appellant, on coming to know what had happened made an application supported by his own affidavit for rehearing of the revision application. This application was rejected by the learned single Judge of the High Court treating it as if it were a review application. The order rejecting the re-hearing was made on 22nd June, 1982. Hence the appeal was preferred before the Apex Court."

But, here there was no representation at all for the respondent when the CRP was taken up for hearing. There was no representation on behalf of the counsel on the ground that the counsel is engaged in some other Court or so on so forth. The order passed in CRP is not an exparte order and it was passed on merits.

3.The learned counsel for the petitioner/respondent in CRP, was given an opportunity to advance his arguments on CRP so as to decide whether the order passed in CRP is liable to be set aside on any other valid grounds. The learned counsel appearing for the petitioner/respondent in CRP would contend that the CRP is not maintainable and that the revision petitioner ought to have filed an application under Section 100 of CPC. Section 100 of CPC runs as follows:
"Sec.100:- 1) Save as otherwise expressly provided in the body of this Code or by any other law for the time being in force, an Appeal shall lie to the High Court from every Decree passed in Appeal by any Court subordinate to the High Court, if the High Court is satisfied that the case involves a substantial question of law.
2) An Appeal may lie under this section from an appellate Decree passed exparte.
3) In an Appeal under this section, the memorandum of Appeal shall precisely state the substantial question of law involved in the Appeal.
4) Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question.

5) The Appeal shall be heard on the question as formulated and the respondent shall, at the hearing of the Appeal, be allowed to argue that the case does not involve such question.

4. The CRP has been preferred against the order passed in CMA.No.3/2002 on the file of the Sub-Court, Ponneri. The said CMA.No.3/2002 was preferred against the decreetal order in E.A.203/96 in O.S.No.188/1975. So against the order passed in CMA only a revision to the High Court will lie under section 115 of CPC.

3. According to the learned counsel for the petitioner/respondent in CRP, there was no proper service of notice as contemplated under Order 21 Rule 22 was served on the judgment debtor. The petitioner is not the judgment debtor but he had purchased the property after final decree was passed on 24.07.1978 from one paul Chand, who in turn had purchased the property from one of the Legal Representatives of the judgment debtors. This point has been elaborately discussed by the executing Court at para 10 of its order in E.A.No.203/96 in O.S.No.188/1975 dated 27.2.2002. The trial Court has correctly observed that the suit is filed for recovery of money on mortgage and as per the final Decree, in default of payment of the amount, mortgaged the property can be sold out and sale proceeds can be adjusted towards the Decree amount. Before the Court auction sale the owner of the property/Judgment debtor must be given an opportunity to know that the property is going to be sold by way of a notice under Order 21 Rule 22 as well as under Order 21 Rule 66 of CPC. But a notice under Order 21 Rule 22 is not mandatory in the sale of mortgaged property. In this case, a notice under Order 21 Rule 66 has been served by way of substituted service under Order 5 Rule 20 of CPC. There is no petition filed by the obstructor under Section 47 of CPC before the executing Court. The sale was conformed in favour of the revision petitioner on 24.10.1994 and thereupon a sale certificate was also issued on 16.12.1994. The objection raised by the revision petitioner was not considered by the first appellate Court, which passed the order in CMA.No.3/2002.

4. The learned counsel for the petitioner relied on the decision reported in 2006(4) SCC 412 (S.Rajeswari Vs. S.N.Kulasekaran and others) and contended that against the order passed under Order 21 Rule 97 only an Appeal will lie and a revision under Section 115(2) of CPC is not maintainable. There can not be any dispute with regard to the above said proposition of law. Here also against the order passed in E.A.203/1996 in O.S.No.188/1975 by the District Munsif, an Appeal has been preferred under C.M.ANo.3/2002 before the Sub-Court, Ponneri. Only against the order passed in CMA.3/2002, this revision has been preferred under Section 115 of CPC. Under such circumstances, the contention of the learned counsel for the petitioner that the Civil Revision Petition is not maintainable can not hold any water. Only to protract the proceeding further, this application has been field. I do not find any reason to modify or set aside the order passed in Civil Revision petition.

5. In the result, this Civil Miscellaneous Petition is dismissed.

ssv

[PRV/7720]